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Supreme Court, U.S.
FILED
SEP 10 2002
OFFICE OF THE CLERK

No. 02-143

In the Supreme Court of the United States

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL UNION NO. 744,

Petitioner,

v.

ANHEUSER-BUSCH, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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ARGUMENT

I. THE ARBITRATOR'S DECISION DID NOT EXCEED THE SCOPE OF THE ISSUE PRESENTED

ABI argues that the arbitrator was limited by the issue presented to him for review and that his ultimate decision betrayed the limits of the issue presented. The issue before the arbitrator was as follows:

> Did the Company violate the labor agreement by changing its practice to conform to the contract provisions related to two-person route commission rates?

The arbitrator had to first determine what the "labor agreement" was before determining if there was a violation. The arbitrator determined that the labor agreement, as modified by the parties' post-execution conduct, was to compensate all drivers at the one-man rate. Consequently, when ABI ceased compensating all drivers at one-man rates, it violated the labor agreement. This finding does not exceed the scope of the issue presented to the arbitrator.

II. THE PANEL'S DECISION IS IN CONFLICT WITH PRECEDENT

ABI argues that the Seventh Circuit set forth the proper standard as promulgated by this Court in *Major League Baseball Players Association v. Garvey*, 532 U.S. 504 (per curiam)(2001) and *Eastern Associated Coal Corp. v. United Mine Workers of Am. Dist. 17*, 531 U.S. 57 (2000), and therefore the Appellate Court's decision does not present a conflict in precedent. ABI is incorrect. It is one thing to set

forth the proper standard and then apply it, correctly or incorrectly, to the facts presented. However, it is entirely different if the proper standard is merely acknowledged and then ignored. Mere reiteration of the proper standard does not establish an allegiance to it. This is not a case in which the Appellate Court misapplied the standard. It ignored the standard and decided the case as if it were the original trier of fact and interpreter of the contract.

All parties are in agreement that the proper standard is that as long as the arbitrator interpreted the contract in making his award, the award must be affirmed even if the arbitrator clearly misinterpreted the contract. The basis of ABI's claim, however, is that the arbitrator acted outside the scope of his authority in interpreting the contract in the manner that he did. Therefore, ABI argues, the Seventh Circuit was justified in vacating the award. The determination of whether the arbitrator acted outside the scope of his authority, however, is dependent on how one interprets the zipper clause. Did the zipper clause foreclose the arbitrator's consideration of post-execution conduct? While the arbitrator in interpreting the zipper clause held that he was not so limited, the Seventh Circuit disagreed.

The basis of the Appellate Court's decision was its disagreement with the arbitrator's interpretation of the contract that he was not barred from considering post-execution evidence. The Appellate Court's disagreement with the arbitrator's interpretation of the zipper clause and the significance of the employer's post-signing conduct is not justification to vacate the arbitration award. Such interpretative disagreement does not mean the arbitrator was acting outside the scope of his authority. If that were the proper standard, whenever a reviewing court disagreed with the arbitrator's decision it could simply label the arbitration

decision as going beyond the scope of the arbitrator's authority and vacate the award. This has never been the practice, nor the standard for courts in reviewing final and binding arbitration decisions.

The Seventh Circuit stated that the arbitrator "paid only lip service" to the limitations on his authority. (App. p. 20a) It was the Seventh Circuit, however, who ignored the limitations on judicial review of arbitration decisions. More specifically, the Seventh Circuit disregarded the mandate that reviewing courts are barred from substituting their judgment for that of the arbitrator.

Judge Coffey's opinion is rife with statements evidencing his disagreement with factual findings and contractual interpretations made by the arbitrator, and the substitution of his judgment for the arbitrator's. For example, despite the arbitrator's distinction between past practices (which he found he could not rely on in interpreting the contract) and post-execution conduct (which he found he could rely on) (App. p. 72a) , Judge Coffey found:

> "[I]t is clear that the arbitrator *did actually rely* (not might have relied) on the employer's past practices." (App., p. 15a)

Further evidence of Judge Coffey's disagreement with the factual findings and the arbitrator's contract interpretation appears throughout his decision. Several examples follow:

1. The arbitrator engaged in contract interpretation of the zipper clause in order to determine if he was barred from considering the post-execution conduct of the parties. (App. p., 73a). Judge Coffey found the arbitrator went beyond the scope of his authority in engaging in such

interpretation. Judge Coffey's opinion in this regard was based on his finding that the "[the contract] required neither interpretation nor interpretative devices" (App. p. 15-16a) and "that the zipper clause was unambiguous" (App. p. 17a). Whether the zipper clause was in need of interpretation is in itself an interpretation. Judge Coffey disliked and disagreed with the arbitrator's interpretation and substituted his own.

2. In evaluating the scope of the zipper clause, the arbitrator found that post-execution conduct was not a "prior agreement" or "practice" barred by the zipper clause (App.p. 73a). Judge Coffey disagreed and held the arbitrator "ignored the clear and specific language of the . . . zipper clause (App. 21a); and "ignored the plain language of . . . the zipper clause . . . ." (App. p. 26a). The arbitrator found in evaluating post- execution conduct, the zipper clause was not clear. Once again, an interpretive difference of opinion between Judge Coffey and the arbitrator. A difference of interpretative opinion, however, does not mean that the arbitrator went beyond the scope of his authority.

3. The arbitrator held that the zipper clause, as he interpreted it, allowed for consideration of post-execution conduct (App. p. 73a-75a). Judge Coffey opined "it is evident that the arbitrator rejected the plain language of the contract, without ever claiming to be 'interpreting' any provision of it ...." (App. p. 17a). The arbitrator states he interpreted the zipper clause in arriving at his decision. Judge Coffey ignores this statement to conclude the arbitrator never claimed to be interpreting any provision of the contract. It is obvious that Judge Coffey does not believe that anyone attempting to interpret the zipper clause could have reached a result different than Judge Coffey. Again, this is simply the reviewing court's substitution of judgment for that of the arbitrator.

And if this were not enough to establish that Judge Coffey fell into the trap of substituting his judgment for that of the arbitrator, he goes so far as to provide his personal opinion about the parties' intent in drafting the contract, stating:

> [t]here would be no need to prevent the arbitrator from 'adding to, subtracting from, modifying or changing in any way the terms of the Agreement' unless the parties clearly intended to prevent the arbitrator from relying on what the dissent calls 'post-signing conduct' when interpreting the agreement." (App., p. 19a)(emphasis added)

Lastly, despite the fact that Judge Coffey states he is making no determination whether the arbitrator's decision was based on poorly supported facts, that is exactly the analysis he engaged in when he found that "the arbitrator's personal opinion concerning 'fairness' of the employer's actions is lacking of support in the record." (App., p. 21a). In reaching this conclusion, Judge Coffey substantively discussed the content of witnesses' testimony given in the arbitration hearing. Judge Coffey stated "all the witnesses called to testify at the arbitration hearing (both Union and employer) agreed that they were fully cognizant of the fact that the two-tiered commission structure and the zipper clause was included in each of the three contracts. " (App., p. 22a). If this is not a reweighing of the evidence before the arbitrator, then what is?

The panel held that the zipper clause needed no interpretation. The arbitrator found that some interpretation of that provision was necessary to determine if it extended to post-execution conduct. While a court may disagree with the

arbitrator's opinion that interpretation was necessary to determine the scope of the zipper clause, that is not a basis for vacating the award.

III. THE PRECEDENT CITED BY RESPONDENT IS INAPPLICABLE.

ABI next argues that even if the lower court misapplied the proper standard, that is not sufficient justification to warrant the granting of certiorari. Local 744 is not claiming a misapplication of the proper standard, but complete disregard for the standard. (Petitioner's Brief, pp. 8-13) ABI also argues that the conclusion reached by the Seventh Circuit is consistent with its precedent that an arbitrator may not rely on extracontractual matters to modify a contract. (Resp. Brief, pp. 14-15) The cases cited by ABI, however, do not support this contention.

In *Tootsie Roll Industries, Inc. v. Local Union No. 1, Bakery, Confectionary and Tobacco Workers' International Union*, 832 F.2d 81, 84 (7th Cir. 1987), as part of a "last chance" agreement, the parties agreed to alter the absenteeism policy and just cause provisions of the collective bargaining agreement for one particular employee. The employee violated the conditions of no additional absences under the last chance agreement, but was in compliance with the terms of the absenteeism policy as set forth in the collective bargaining agreement. The arbitrator held that the employee's discharge was not in compliance with the absenteeism policy as set forth in the collective bargaining agreement and therefore was not for just cause. The *Tootsie Roll* court held that the last chance agreement was an enforceable modification of the contract, and that the arbitrator failed to enforce the terms of the that agreement and vacated the award. In this case, just like the court in *Tootsie Roll,* the arbitrator found a modified, yet

enforceable contract. The only difference being the modification in *Tootsie Roll* was in writing, while the modification in this case was based on conduct. *Tootsie Roll* is entirely consistent with the arbitrator's decision.

In *Judsen Rubber Works, Inc. v. Manufacturing, Production & Service Workers Union, Local No. 24*, 889 F.Supp. 1057 (N.D.Ill. 1995), the issue presented to the arbitrator was whether the employer violated the collective bargaining agreement by refusing to continue a past practice of compensating employees for time spent "washing up." The arbitrator found that this past practice had evolved into an express term of the contract. *Id.* at 1059. The arbitrator 's decision was based solely "on his determination [that] the parties' past practice was indistinguishable from an express written provision of the contract." *Id.* at 1063. The basis for the arbitration decision in this case is entirely different. Unlike the arbitrator in *Judsen*, the basis for the arbitrator's decision in this case was limited to the post contract execution conduct and did not rely on any "past practice" of the parties. In fact, the arbitrator specifically found that he could not rely on the parties' past practice prior to the execution of the 1998 collective bargaining agreement, a fact in and of itself wholly distinguishing *Judsen*.

In *Merk v. Jewel Food Stores*, 945 F.2d 889 (7th Cir. 1991) the court found that the collective bargaining agreement was not fully integrated so that parol evidence could be considered in interpreting the contract. However, the parol evidence in *Merk*, a covert and secret agreement between union officials and company management, was deemed inadmissible because national labor policy forbids enforcement of secret agreements. Hardly on point.

In *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603 (7th Cir. 1993), retired employees of Wheelabrator argued that under the most recent contract the employer was obligated to provide them with lifetime health insurance benefits. That court held extrinsic evidence admissible only when the contract language needs clarification. The facts in this case are quite different. Here, the arbitrator's finding followed his interpretation that the zipper clause allowed post execution conduct to modify the contract.

In *Broth. Of Main of Way Emp v. Atchison, Topeka*, 138 F.3d 635 (7th Cir. 1997), the issue was whether an underlying dispute was "major" or "minor" under the Railway Labor Act. The majority opinion in this decision did not address any issues that would be applicable to the instant case. The dissent, however, stated that extrinsic evidence cannot be used to contradict the contract. But in this case, the arbitrator only used contract construction principles in interpreting the contract to conclude that the terms of the zipper clause permitted post-execution conduct to change the contract. He did not consider extrinsic evidence in interpreting the contract.

Finally, *Central States Areas Pension Fund v. Kroger Co.*, 226 F.3d 903 (7th Cir. 2000), concerned an ERISA claim by a multiemployer pension fund for pension contributions. The court found that the employer could not rely on a past practice of not making contributions to change the terms of the contract. In this case, the arbitrator applied the same standard, specifically holding he could not consider any past practice in making his determination.

The cases cited by ABI are inapposite. All of them concern an arbitrator's reliance on past practice or other extrinsic evidence in interpreting the contract. In this case,

the arbitrator did not rely on any past practice or other extrinsic evidence in interpreting the zipper clause of the contract.

CONCLUSION

For all the foregoing reasons, the Petition For Writ of Certiorari should be granted.

Respectfully submitted,

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